

Charles Owens, NFIB - Support SCR 15 4  
SR 147

## Boiling-Down the Federal Government's Clean Water Act Land-Grab

Posted on May 13, 2014 by Luke White

NFIB and NFIB Small Business Legal Center are currently in the process of preparing comments, which we will soon submit to the Environmental Protection Agency (EPA) and the Army Corps of Engineers, voicing small business concerns and legal objections to newly proposed Clean Water Act (CWA) regulations that we believe amount to a massive regulatory land-grab. This is a hot button issue because EPA and Army Corps are seeking to expand their regulatory powers in a manner that will severely impact many landowners throughout the country—including many small business owners. This hits closest to home for ranchers, farmers, and anyone making intensive use of their property—especially folks in the construction industry. But, the truth is that it is going to affect any business with real estate that might potentially be said to contain wetlands under the new regulations.

For this reason NFIB and NFIB Legal Center are taking the proposed CWA regulations very seriously. As always, we are standing up to the federal government on behalf of the little guy. Here is a quick recap of what the CWA is and how the federal government is working to expand its jurisdiction beyond what Congress intended, and beyond what the Constitution will allow.

### What is the CWA?

The CWA is a federal law that is designed to protect the integrity of our nation's waters by eliminating pollutant discharges into the "waters of the United States." While this is certainly a laudable goal, it is enforced with rather draconian measures (\$37,500 per day fines). The CWA doesn't just prohibit companies from dumping toxins into the water. It's much more comprehensive than that. The CWA prohibits any sort of filling, or dredging of "wetlands." This means that it's essentially impossible—at least without a costly permit—to make economically beneficial uses of a lands covered by the CWA. But, the beef is usually in figuring out what is—and is not—a jurisdictional wetland.

### CWA Jurisdiction is a Difficult Issue

EPA and Army Corps have long been bothered by the fact that it is sometimes difficult for them to prove CWA jurisdiction. This is because the CWA's reach is always a murky question. We know that Congress gave the Agencies the power to regulate "waters of the united states." But that's a pretty vague charge. Not surprisingly, the Agencies have long tried to interpret this to mean that they have the authority to regulate anything and everything wet—conceivably even a mud-puddle. But the Supreme Court has repeatedly rebuffed the Agencies for making overly aggressive assertions of jurisdiction.

Most recently in 2006 the Supreme Court held that EPA had over-reached in asserting CWA jurisdiction over any water that "migratory birds" might visit. The Court reaffirmed that the Constitution places limits on the Agency's jurisdictional reach, such that jurisdictional wetlands must bear a close connection, or nexus, to "traditional navigable waters." This means that the Agencies must prove that a regulated wetland is connected to a stream or river that could in fact be used for commercial purposes. Of course the further we get away from conventional water bodies (bays, sounds, lakes, rivers, streams, etc.), the more murky things get. At what point is a marsh or mudflat going to be considered a wetland? At what point will we consider a mere indentation in

the ground—that occasionally has water overflow—a jurisdictional wetland?

These are very difficult questions. They are so difficult that the Supreme Court could not agree on how to draw the line. In fact the Supreme Court's decision in *Rapanos v. United States* was so divided that the Court gave us two different tests. This left everyone scratching their head, as it seemingly made a complicated issue more confusing than ever.

### Expanding the Reach of the CWA

In response EPA and Army Corps released a guidance document in 2008, which aimed to help the Agencies figure out when to assert CWA jurisdiction under the *Rapanos* tests. But, under President Obama, the EPA and Army Corp. have taken a more aggressive stance on these jurisdictional issues. The Agencies are apparently frustrated by how difficult and fact intensive it is to prove jurisdiction under the *Rapanos* tests. So they have been looking for ways to make it easier to assert jurisdiction over lands that have very tenuous connections—if any—to commercially navigable waters.

First in 2012 the Agencies proposed a new guidance document that would have expanded CWA jurisdiction to include any land over which water occasionally flows that feeds into any watershed. The result would have been a radical regulatory land-grab. But the Agencies changed course, concluding that it would be more effective to promulgate an official regulation. And so now EPA and Army Corps have proposed a regulation that will do the same thing. By their own admission, the new regulation will expand CWA jurisdiction by at least three percent. But, given that the Agencies are now asserting jurisdiction over entire watersheds, we think that's a very low-ball estimation. To be sure, EPA will now be asserting CWA jurisdiction over more than a million square miles of land—or 41% of the lower 48 states—in the Mississippi watershed alone.

If this is an issue of concern to you, we recommend that you continue following the NFIB Blog for further updates. Also, you can follow NFIB Legal Center on [Facebook](#) for the most current updates. And if you are a NFIB member specifically concerned that the new regulations will affect you, we invite you to contact us.



#### About Luke Wake

Luke A. Wake is a senior staff attorney at the NFIB Small Business Legal Center. Wake has particular expertise on environmental and land use issues, and has worked on numerous other constitutional issues and matters of importance to small business owners. He is an ardent defender of private property rights, which he believes are essential to the free enterprise system and the foundation of American liberty. As a strong advocate of individual rights and economic liberties, he has built his career defending small business interests. Since joining the NFIB Legal Center, Wake has focused on a whole host of issues, from employment law matters to regulatory compliance. In addition to serving as a resource for small business owners, Wake remains committed to the Legal Center's pledge to ensure that the voice of small business is heard in the nation's courts.

Be the first to like this.